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IN THE

Supreme Court of the United States

No. 775

JOHN W. MARTIN, as Trustee of the Property of FLORIDA EAST COAST RAILWAY COMPANY,

Petitioner,

vs.

MAYNARD R. TINDELL,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 98 So. 2d 483, and is copied in full in the Appendix of the Petition.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

NOTE: All emphasis supplied.

QUESTIONS PRESENTED

Petitioner presents four questions:

1. Whether Petitioner was entitled to a directed verdict.

2. Whether the trial court's charges on a railroad's duty to provide a safe place to work were erroneous.

3. Whether, under Florida Common Law Rule 28, it was error to deny Petitioner's motion for a Court-appointed doctor.

4. Whether the verdict is excessive.

STATUTES INVOLVED.

45 U.S.C. Sec. 51 provides:

> "Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.
>
> Every common carrier by railroad while engaging in commerce— between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the

death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign —commerce, or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404."

45 U.S.C. Sec. 53 provides:

"Contributory negligence; diminution of damages.

In all actions hereafter brought against any such common carrier by railroad under or by virture of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in

his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: **Provided,** That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 3, 35 Stat. 66."

Florida Common Law Rule 28 (a) (Present Rule of Civil Procedure 1.29 (a)) provides:

"(a) Order for Examination. In any action in which the mental or physical condition of a party, or injury to property is in controversy, the court in which the action is pending may, in advance of the trial, order such party to submit to a physical or mental examination by a physician or other such qualified expert or may order an examination of the property alleged to have been damaged or injured by the defendant or his agent, or of the party alleged to have caused the damage or injury. The order may be made only upon good cause shown and upon notice to the party to be examined and to all other parties and to all persons in whose custody such property may then be, and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made."

STATEMENT

On January 16, 1953, the Petitioner received notice that air conditioning unit on one of its tavern cars was leaking badly (R. 26, 52-53). When the Respondent was injured on January 20, 1953, the Petitioner, for five days, had used this car for carrying passengers and employees despite full knowledge of the fact that the leaky unit was flooding the passageway in the car with "torrents" of water (R. 42), making the only means of ingress and egress "slippery, wet and dangerous". (R. 38-39).

The undisputed evidence shows that the Petitioner's air conditioner had a drip pan and drain pipe which worked just like a wash bowl in a home. When working properly, the water would fall into the pan and drain through the pipe to the ground underneath the car. The end of the drain pipe in question was underneath the car and completely clogged up with rust and scale (R. 55, 180-181). Since the water could not drain out, it backed up and flooded the car (R. 55-56). Mr. Reedy, head of the Petitioner's Air Conditioning and Steam Heat Equipment Department at the time of the accident, testified the defect was so obvious that "any good air condition mechanic could have found it" while the car was in a repair shop where its undercarriage could be inspected (R. 60).

The Petitioner did not actually discover that a clogged drain pipe was causing the condition until two days after the accident (R. 55). Mr. Reedy testified that the accumulation of rust and scale in the pipe must have been there "30 days or longer" and that the air conditioners were inspected monthly (R. 56). Thus, it is apparent at the

outset that the Petitioner made at least one inspection of the unit and negligently failed to discover the defect.

Five days before the accident, the Petitioner's traveling mechanic filled out a form stating that while the car was being used, water was dripping from the unit to the floor of the car (R. 26-27). The next day another traveling mechanic filled out another form stating that the unit was "leaking water badly overhead." (R.35-36). He then wired ahead stating the car was slippery and should be cut out (R. 37-38). A short time later a passenger fell in the slippery aisle and the mechanic had the conductor send out a second wire saying the car was "slippery, wet and dangerous." (R. 38-39). Since this was a Saturday, the mechanic made a personal phone call in an effort to get the car cut out, but was told that the Petitioner "would take care of it Monday." (R. 39). On Monday, the defect was reported again (R. 52-53).

On Tuesday, the day of the accident, the bartender of the tavern car reported for work and upon seeing that "water was coming down out of the air conditioning units in torrents" (R. 42), reported to his supervisor that "the car wasn't in condition to go out." (R. 43). The bartender then reported the matter to the train master whereupon the following occurred:

"Q What did you tell him?
A I told him — he came and looked also and I told him the car should be cut out and he told me it wasn't any of my business.

Q He told you it wasn't any of your business?
A Yes.

Q Did the car go out?
A Yes." (R. 44)

During the five day period of reporting the defect, railroad mechanics "repaired" the unit on two occasions (R. 210, 211), but never discovered that the drain pipe was clogged up although "any good air condition mechanic could have found it." (R. 60)

The above facts show beyond question that the "slippery, wet and dangerous" condition of the car was created by the Petitioners negligence in inspecting the car, in attempting to repair it, and above all, in deliberately using the car with full knowledge of its dangerous and defective condition despite the protests of an employee on the morning of the accident that the car should be cut out. Consequently, the Petitioner concedes the fact of its negligence.

Respondent, Maynard Tindell, had worked for the Petitioner for twenty-three years (R. 186). At the time of the accident he was a traveling mechanic who rode on the trains, making such light repairs as could be made while the train was underway (R. 204). Upon discovering the leaky air conditioner, Tindell made an inspection and determined that the car could not be repaired while in service (R. 48, 207, 195, 358).

The leaky air conditioner had completely flooded the aisle of the tavern car (R. 40-41), and this aisle was the only means of ingress and egress in the car. The aisle was just big enough for a person to pass through and it was impossible to use the aisle without walking in the water (R. 40-41, 47, 65, 74). Since the leak could not be

fixed enroute, Tindell turned off the compressor (R. 193-194); told the bartender to keep mopping up the floor (R. 192); and he and the bartender put down all the newspapers that could be found on the train (R. 362). When the newspapers became soaked they were removed (R. 362).

Just prior to the accident, Tindell, with wrenches in his hand (R. 66), went to the conductor at the far end of the car and asked him to wire ahead and have the car cut out (R. 359). As Tindell was returning to the other end of the car via the slippery aisle which was the only way to pass through the car, the train rounded a curve, the swaying motion threw his feet out from under him on the slippery floor and he was injured (R. 66-67, 355-356).

Before the accident, Respondent was a healthy robust individual with no prior history of heart trouble or rheumatic fever (R. 119). At the age of 43, he had worked for the Petitioner almost 25 years without a single serious illness (R. 119, 186). Thus, on the day of the accident Respondent was a man in perfect health and in the prime of life.

When Respondent fell he landed on his back with his head striking a nearby radiator (R. 107). He was knocked unconscious (R. 67) and awakened with "terrific pain" in his head, back and legs (R. 67-70, 107). He was given hypodermic injections on the train which "didn't do any good" (R. 69) and was removed by stretcher to a waiting ambulance when the train reached Saint Augustine (R. 69-70).

Respondent was taken to the Petitioner's hospital at Saint Augustine where he remained for eighteen days.

Examinations revealed blood in the urine and a mild cerebral concussion (R. 108, 122). X-rays showed no fractured vertebra but plaintiff had constant headaches, and pains and numbness in his legs, shoulder blades, and the back of his neck (R. 108), resulting from a ruptured intervertebral disc in his low back area (R. 243).

After his eighteen days in the hospital, Respondent was sent home for "modified bed rest". (R. 109). For the first month Respondent stayed in bed most of the time and continued to have headaches and pains in his back, shoulder blades, and legs (R. 109). Respondent remained at home for a total of three months (R. 109). He developed a choking feeling in his throat, pain and pressure in his breast bone, nervousness, mental depression, dizziness, a ringing in his ears, and physical weakness and inability to sleep. (R. 110, 230-232) Dr. Burtner stated that Respondent's symptoms showed an "anxiety-tension state which was superadded or superimposed upon the pain in the back, pain in the neck, and head and legs." (R. 110) Dr. Burtner further stated that this was a condition over which Respondent had no control and was "a rather usual development" (R. 111) from injuries such as Respondent received in his fall.

Respondent returned to work on May 1, 1953, nearly four months after the accident, doing light work (R. 112). While at work, Respondent's pains and anxiety-tension state continued without a let up and his condition actually grew worse (R. 112). Finally, after four more months in this condition, plaintiff suffered an acute myocardial infarction due to a coronary thrombosis while reading at home in preparation for his Sunday school lesson (R. 113-114).

Respondent spent nineteen more days in the hospital and was then sent home to convalesce (R. 114). Before his case was tried, Respondent had suffered four more heart attacks and had been hospitalized four more times (R. 115-117).

As Dr. Burtner explained in detail, a coronary thrombosis occurs when the flow of blood through an artery is restricted. A constricting spasm of the artery shuts off the flow of blood; a clot may form; and heart tissue dies for lack of nourishment (R. 124-135). Among the factors which can cause the artery to constrict are pain, physical exhaustion and anxiety tension (R. 134, 165-167). Dr. Burtner testified that in his opinion there was a causal relation between the injuries sustained in the fall and the heart attacks (R. 141) and stated:

> "Q . . . Do I understand from your testimony that it is your opinion that the accident, followed by the state of anxiety-tension that you have described, was the precipitating factor that precipitated the heart attack which Mr. Tindell had in September, 1953?
>
> A Yes, I would put it this way: I would say that as a result of the accident this man developed an unusual amount of anxiety-tension state and that the anxiety-tension state, because it was so severe and lasted as long as it did, was the trigger mechanism in all probability as near as anyone can possibly tell of the actual coronary thrombosis and myocardial infarction. That is the important trigger mechanism.

Q So that, in your opinion then, there was a cause and effect relationship present between the two through the avenue you have described?

A Yes." (R. 140-141)

On the above facts, the jury returned a $125,000 verdict for Respondent. A final judgment entered thereon was affirmed by the Supreme Court of Florida.

REASONS FOR DENYING THE WRIT

Respondent respectfully submits that this Petition should be denied for the following reasons:

1. The decision below is of no importance whatsoever beyond the facts of the particular case.

2. The Third Question concerning denial of a Court-appointed doctor presents no federal question. Florida interprets its rules of civil procedure as allowing such appointments in the discretion of the trial judge. The opinion below specifically holds that when the plaintiff is treated by defendant's doctors and defendant has full knowledge of the plaintiff's condition, a Court-appointed doctor can be denied within the trial judge's discretion. This holding is manifestly reasonable. The problem as to how Florida Common Law Rule 28 should be interpreted is one of Florida rather than Federal law and presents nothing for the Court to review. Petitioner never claimed below that any Federal law was involved as to Court-appointed doctors, and presents no Federal law as a basis for review in its Petition.

3. The Fourth Question, claiming the verdict is excessive, is nothing more than a request that this Court reweigh medical testimony which has already been evaluated by a Florida jury, trial judge, and Supreme Court. It is unnecessary to decide whether this Court has power to reweigh medical testimony as to excessiveness. No claim was made below that excessiveness was a Federal law question. Furthermore, it is obvious that the finding below is correct.

4. The Second Question concerning the duty of care under the FELA is admittedly one of Federal law. However, it was answered by the Florida Supreme Court precisely in accord with the Federal law as announced by this Tribunal. The opinion below expressly follows this Court's holding in YAZOO AND MISSISSIPPI VALLEY R. CO. v. MULLINS (1919), 249 U.S. 531, that the duty is merely to use reasonable care to provide a reasonably safe place to work. The jury below was repeatedly so charged (R. 366-368, 369-370, 371) and the opinion below does no more than hold that the charges on reinstruction could not have misled the jury (which had already found the Petitioner negligent) when the charges were considered as a whole. Moreover, the charge on reinstruction specifically incorporated by reference all the prior instructions stating ". . . it was the duty of the railroad company to provide a safe place for him to work, **and you were instructed to that effect.**" (R. 373)

5. The First Question claims an utter lack of evidence to support a finding that "fault of the employer played any part in the employee's injury." ROGERS v. MISSOURI PACIFIC RAILROAD CO., 352 U.S. 500 at 510. The uncontradicted record shows Petitioner was

negligent in using a slippery, wet and dangerous car for an extended period of time with actual knowledge of its condition.

There is no occasion for inquiry as to what the law would be if the defect causing injury were one that Respondent was specifically employed to correct. The uncontradicted record shows that Respondent was a travelling mechanic whose job was to make whatever light repairs were possible while the train was underway. The defect which caused the accident was a clogged pipe underneath the car. The defect could only be corrected in a repair yard when the car was out of service and could not have been remedied by Respondent. Cf. LOUISIANA & ARKANSAS RY. CO. v. JOHNSON (CA 5, 1954), 214 F. 2d 290, cert. den. 348 U.S. 875; BOAT DAGNY, INC. v. TODD (CA 1, 1955), 224 F. 2d 208.

CONCLUSION

It is respectfully submitted that the Petition should be denied.

WILLIAM S. FRATES

WALTER H. BECKHAM, JR.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing has this 14 day of FEBRUARY, 1958, been delivered to George F. Gilleland, Esq., 627 Ingraham Building, Miami, Florida, Attorney for Petitioner.